80644-6

NO. 80644-6

SUPREME COURT
OF THE STATE OF WASHINGTON

GEOFFREY S. AMES, M.D.,

Petitioner,

v.

WASHINGTON STATE HEALTH DEPARTMENT AND MEDICAL QUALITY ASSURANCE COMMISSION,

Respondent.

AMICUS BRIEF OF WASHINGTON CITIZENS FOR HEALTH OPTIONS, INTEGRITY, AND CLINICAL EXCELLENCE

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I. INTRODUCTION

Amicus Washington Citizens for Health Options, Integrity, and Clinical Excellence (hereinafter "WaCHOICE"), is an organization of holistic physicians and other health care providers, their patients and supporters, created to resist renewed attempts by elements in establishment, mainstream medicine to frustrate, impede or destroy holistic and other alternative health care.

Those elements, Amicus contends, control the Washington State Medical Quality Assurance Commission (hereinafter "MQAC"), which has ***not one*** holistic physician as a member, nor any other person identified with alternative medical options. Amicus's observations and investigations convince it that every one of the Commission's professional members has evinced hostility toward alternative medicine.

Over the years, many alternative modalities have been validated by the public's continuing, indeed, increasing, use of and satisfaction with them, despite the fact that they were not covered by insurance and were constantly disparaged by mainstream medical organizations and practitioners. More importantly, they have been increasingly validated by rigorous scientific studies, such as randomized controlled clinical trials, even though by their nature, the effectiveness of energy therapies cannot

be fully evaluated by current methodologies. CR 2960-2961, 2977-2981[1]; *see* Foster and Huber, *Judging Science: Scientific Knowledge and the Federal Courts* 62 (M.I.T. Press, 1999) (even impeccable studies are suspected by die-hard conventional observers who refuse to accept them because they do not jibe with Western biomedical paradigms).

Most importantly, these modalities have been recognized by legislation. *See*, e.g., RCW 18.06.010(1), 18.36A.040. It is now, therefore, this state's public policy that these alternative therapies may be made available as options to ***all*** patients when dissatisfied with the care they receive from establishment medicine.

Among these modalities are acupressure (a form of acupuncture) and homeopathy, two forms of "energy" medicine, which in one version or another, are major forms of holistic health care. *Ibid.* In recognizing acupressure and homeopathy, which are based on Asian and other energy concepts foreign to and rejected by Western biomedicine, the Legislature implicitly ruled that no state agency can decree that those concepts are invalid (with the possible implied exception that this might be done if new, rigorous science indisputably establishes invalidity). *See* CR 2963-64. *See*, also, RCW 18.130.180(4) (use of a non-mainstream modality cannot in itself be held to be negligence).

[1] "CR" refers to the Certified Record on Appeal.

A. Interest of Amicus Curiae in these Proceedings

Notwithstanding the Legislature's recognition, in this case, a hearing panel of the MQAC ruled that a biofeedback device employed to generate the harmless homeopathic signals associated with eggs (CR 2155-2156; 2874-2876; 2879-2881) could not be used as part of a muscle test to see if the signals adversely affected the acupuncture meridians related to a patient's arm muscle, thereby providing some evidence of a possible egg allergy.

It should be noted, too, that in this case, the muscle test was used to ***confirm*** a conventional blood test reporting an allergy to eggs, as the MQAC itself found. CR 1858, ¶¶ 1.15, 1.16. In fact, the patient whose care was the subject of the disciplinary proceeding, and whose entire testimony the Order issued by the Court of Appeals below embraced, CR 1854, expressly testified that the diagnosis of egg allergy he thought the Petitioner had made was based on the blood test, not the muscle testing.

The hearing panel found that the device was "inefficacious," rejecting the Legislature's implicit acceptance of both Asian and homeopathic principles as legitimate options for patients, even though there was ***no*** expert or other scientific evidence that the device did not emit such signals or that the muscle could not be weakened by them. [RCW 34.05.461(3) expressly requires that a finding in the words of a

statute – e.g., a finding that a therapy is "inefficacious" and/or that use of a particular therapy or device constitutes "negligence" – must be accompanied by a statement of the reasons and evidence on which it is based.]

If mainstream medicine can attack and prohibit an alternative medical modality in this way, despite its legislative recognition, it can, in its uncontrolled discretion, do the same to every other alternative procedure, therapy or device and drastically limit the repertoire of procedures and therapies that alternative practitioners may use.

For these reasons, the failure of the Court of Appeals to grant Petitioner the true review to which he was constitutionally and statutorily entitled is of urgent concern to Amicus. If this mode of reviewing an MQAC decision is implicitly authorized by this Court's refusal to take this case, it will mean that alternative practitioners cannot depend on the courts to review the record and thereby protect them from conventional health care regulators when they act unlawfully. This would be a disaster for freedom of health care choice, for progress in developing new modes of health care, and for holistic practitioners who have committed their lives to providing care for conditions mainstream medicine has been unable to effectively. *See*, e.g., *Rogers v. State Bd. of Med. Examiners*, 371 So.2d 1037, 1041-1042 (Fla. 1st DCA, 1979); *People v. Privitera*, 23 Cal.3d 697, 724-725, 591 P.2d 919 (1979) (Bird, C.J., dissenting).

B. *Amicus Curiae's Familiarity with the Issues and Scope of the Arguments to be Presented by the Parties*

Amicus has reviewed the Findings of Fact, Conclusions of Law and Final Order of the MQAC (hereinafter the "Order"), portions of the Certified Record on Appeal, including the hearing transcript, the briefs in the Court of Appeals, the opinion of the Court of Appeals, Petitioner's Motion for Reconsideration, the Petition for Review, and Respondent's Response to the Petition for Review.

II. ISSUES THAT PUBLIC POLICY REQUIRES BE REVIEWED AND THAT SATISFY THE REQUIREMENTS OF RAP 13.4(b)(3) AND 13.4(b)(4)

Amicus contends that every issue raised by Petitioner is of vital concern to alternative health care and requires resolution in order to prevent the MQAC from ignoring or discarding the policies expressed in the laws legitimizing acupuncture, acupressure, homeopathy, dietary therapy and other forms of health care. Each of the acts, omissions and doctrines committed, omitted or employed by the MQAC and the Court of Appeals in this case, and which are challenged by the issues Petitioner poses for this Court's review, constitutes a severe threat to alternative health care. Each is thus far more than merely "an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b).

In addition, the validity and scope of the so-called *Jaffe* rule[2], which is adopted in whole or part by the dicta lifted from the *Davidson-Johnston-Brown*[3] line of cases and relied upon by the MQAC; the failure to announce the factual theory on which liability was predicated until it appeared for the first time in the Order on appeal; and the failure to provide Petitioner with substantive judicial review of the MQAC's decision, raise significant issues of due process under the state and federal constitutions. RAP 13.4(b)(3).

The consistency of the *Jaffe* rule with RCW 34.05.461(3), enacted in 1988, several years ***after*** *Johnston* and *Davidson,* and never addressed by *Brown* (which cited, but did not actually rely on those cases) and with RCW 18.130.180(4), enacted in 1991, are issues that have never been addressed in this state, and thus compel review because they are also issues of first impression.

Review here is of particular importance because despite this fact, the Court of Appeals elected not to publish the only judicial statement of the meaning of this regulation and statute – thereby leaving the health care community in the dark about their application, and creating the substantial danger that they will be applied differently to different parties, depending,

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[2] *See Jaffe v. State Department of Health*, 135 Conn. 339, 64 A.2d 330 (1949).
[3] *See Davidson v. Department of Licensing*, 33 Wn.App. 783, 657 P.2d 810 (1983); *Wash. Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983);

for example, on whether they are orthodox or alternative practitioners.

The finding that a mistake of professional judgment was negligence, without any evidence that the error was not consistent with the exercise of reasonable care, is obviously one that is of "substantial public interest," since it contradicts the law of torts and the common experience that all professionals make mistakes, and that that in itself does not mean that they thereby act unprofessionally when they do so.

III. ARGUMENTS IN FAVOR OF THE GRANT OF REVIEW

A. Indefensible Assumptions Underlying the So-Called "Jaffe Rule"

The so-called "*Jaffe* Rule," referring, as indicated, *supra,* to the holding in *Jaffe v. [Connecticut] State Department of Health*, was stated as follows:

> Expert opinions of other physicians offered before [the medical board] could have been disregarded by it, and from a practical standpoint would in all probability have had little, if any, effect in bringing it to a decision at variance with its own conclusion upon the question whether or not the conduct of the practitioner had been compatible with professional standards or whether or not he was competent.
>
> ...The board was competent to determine such questions without hearing expert opinion evidence.
>
> ...As we must presume the members of the board to have been competent to determine the issues upon the basis of their own knowledge and experience, the offer of expert testimony was not necessary.

Brown v. Department of Health, 94 Wn.App. 7, 972 P.2d 101 (1998).

Jaffe, supra, 135 Conn. at 349-50, 64 A.2d at 336.

In Connecticut in 1949, however, board members were all physicians. So, too, were all board members physicians at the time (1983) that this Court decided *Johnston, supra*. Thus, the presumption that physician board members were competent to make medical decisions was *somewhat* more grounded in Connecticut in 1949 and in Washington in 1983 than such a presumption would be now in Washington, wherein the MQAC has public (non-medical) members[4].

In direct opposition to the *Jaffe* rule, the Administrative Procedures Act (hereinafter "APA") is informed by the assumption that sometimes administrative agencies make mistakes, act out of emotion, are overzealous, and will sometimes be unduly influenced by the unsupported, but passionately-held ideology of the industry or profession they regulate and with which they identify. The APA represents an implicit recognition by the Legislature that administrative agencies do not always act lawfully, e.g., that they may make decisions based on insufficient evidence, erroneous views of the law, and prejudice. The provisions enabling meaningful judicial review set out in RCW 34.05.461(3) and 34.05.570(3) make this clear.

[4] In the instant case, two of the three panel members were non-physicians (one physician's assistant and one public member with no medical training).

Likewise, this Court can logically infer that the protection of alternative physicians in RCW 18.130.180(4) was enacted – as the legislative history recited – because medical boards had discriminated against alternative physicians.

The substantial evidence rule states in a typical formulation:

> Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

See, e.g., *In re Forfeiture of One 1970 Chevrolet Chevelle*, ___ Wn.App. ___, 167 P.3d 599, 607 (Div. 1, 9/17/07). How can a reviewing court know whether "a fair-minded, rational person" would be persuaded of a medical, scientific or otherwise technical fact about which that court has no knowledge, unless the agency puts enough expert evidence into the record on these matters to make the finding appear reasonable or at least plausible?

In addition, to insure that the agency is not, out of possibly well-intentioned, but misguided zeal, creating *ad hoc* standards and facts that do not exist in the real world, but achieving objectives it could not otherwise defend, it is essential that there be an independent standard: that some expert, other than those on the hearing panel, testify under oath (and subject to cross-examination) that the facts and the standard are as the agency ultimately finds them to be.

Thus, the *Jaffe* rule makes it impossible for reviewing courts to

review factual determinations, and mixed law-and-fact determinations, like negligence, under the substantial evidence rule.

B. The Hearing Panel and the Court of Appeals Erroneously Interpreted the Concept of "Promotion for Personal Gain"

The conclusion that using a supposedly inefficacious device or treatment in a medical practice, even if the physician does not charge for its use, but does supposedly charge for the treatment related to it, is "promotion for personal gain" of that device under RCW 18.130.180(16), is another one of the legal rulings that would never be applied to a conventional physician. Amicus contends that the statute uses the words "promotion for personal gain" to address those situations in which a licensee acts in an entrepreneurial mode, not acting as a physician in a clinic.[5]

In addition, as construed by the hearing panel and the Court of Appeals, it makes such use a violation even if there has been no fault of any kind – negligence or otherwise. This discourages the use of new modalities or modalities which appear to be the best available at this point in the history of health care. Such a construction would deny patients the best available care.

[5] This would mean, for example, that a physician who used a device or a drug, off-label, only to find later, because of subsequent clinical trials that its apparent effects could not be confirmed, would be guilty of unprofessional conduct. Since off-label and other experimental uses of drugs and devices are common, the result would be that hundreds of thousands of conventional doctors nationwide would have to be disciplined.

IV. CONCLUSION

Amicus Curiae, therefore, urges this Court:

1. To grant the Petition for Review; and

2. To reverse the decision of the Court of Appeals, which affirmed the decision of the trial court, and concluded that Petitioner had engaged in unprofessional conduct.

DATED this 10th day of December, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Kenneth S. Kagan, WSBA No. 12983
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